IN THE HIGH COURT OF JUDICATURE AT BOMBAY

Appellate Side

First Appeal No.l683 of 2005
with
Civil Application No.3l06 of 2005

Smt Sundari S Shetty ...Appellant
vs
The Brihan Mumbai Mahanagar Palika and anr ..Respondents

Ms Indira Jaising with Ms Sujata Ibrahim i/b Prakash Mahadik for appellant
Mr. J J Xavier for BMC - respondent no. l
Mr. P N Modi with S K Shah i/b Narayan and Narayan for respondent no.2

CORAM: A.M KHANWILKAR J.

Dated l9.l.2006

P.C:

l. Heard the learned counsel for the parties at length. Perused the relevant materials produced by the parties at the time of hearing. As arguable points are raised Admit.

2. Mr Xavier for the respondent no.l and Mr Modi for respondent no. 2 waive service. Appeal is heard forthwith by consent.

3. For the nature of final order that I propose to pass I shall refer to only relevant facts and materials to decide the point in issue. The suit was filed by the appellant-plaintiff in the court

of City Civil Court, Bombay. being L.C.Suit No.6l57 of 200l challenging the proposed action of the respondent no.l Corporation referred to in suit notice issued under section 35l of the Bombay Municipal Corporations Act dated 27.6.200l and subsequent order passed on the basis of the said suit on l7.ll.200l by the Asst Municipal Commissioner rejecting the claim of the appellant/ plaintiff about the existence of the suit structure prior to the datum line l.4.l962. Both the parties produced evidence in support of their case. The trial court has in the first place found that the description of the suit structure mentioned in the suit notice Exh 9 is entirely different from the description of the structure referred to in the documents pressed into service including Exh 7 being extract of the assessment order.

4. The principal controversy that needs to be addressed is whether any structure existed on the site prior to the datum line. From the evidence on record it is seen that the structure described as "A C sheet shed" existed on the compulsory open space prior to the datum line. This is not in dispute before this court. Indeed, there was litigation between the plaintiff and the defendant

no. 2 with regard to the user of the said structure which was put up on the stated compulsory open space available and enjoyed by the other occupants of the building. In the said proceedings, plaintiff's predecessor gave an undertaking to the effect that he will not use the compulsory open space for any other purpose than to be maintained as open space for common enjoyment of other occupants of the building. The said Suit No l554 of l958 was eventually decreed by this court on l2.7.l96l. It is not necessary to examine whether the predecessor of the plaintiff abided by the said decree and undertaking given to this court, for the nature of controversy involved in the present suit.

5. In the present suit, the limited controversy that will have to be considered is whether the offending structure, which is referred to in the suit notice, existed prior to the datum line and the nature of such structure as it existed then. Suffice it to observe that from the evidence on record it is seen that "A C sheet shed" existed on the stated compulsory open space which was available for common utility for the other occupants of the building. In due course of time,

however, the structure has undergone change and has taken the form, as is referred to in the suit notice. That change has occurred obviously after the datum line and there is no record to suggest that such change was effected after obtaining prior permission of the authorities. The plaintiff has come on the scene in the year l988-89. According to her the structure which is referred to in the suit notice was in existence in the same form since prior to the datum line. However, I am in agreement with the finding reached by the trial court that the stand taken by the plaintiff is unacceptable to the extent of the nature of description of the suit structure. In other words, the structure which existed prior to the datum line, is shown as "A.C.sheet shed", has now been converted into "C I sheet shed" and consists of wooden loft, tarpaulin roof with bamboos etc, as referred to in the suit notice. Even the argument of the learned counsel for the appellant proceeds on the premiss that the materials on record would at least support the position that one "A.C.sheet shed" was in existence on the compulsory open space prior to the datum line. Suffice it to observe that the structure which existed prior to the datum line was different than the one noticed during the

inspection by the officers of the Corporation on the basis of which the suit notice came to be issued.

6. On this finding it necessarily follows that the structure in the form in which it now stands on the site cannot be accepted as in existence prior to the datum line. To get over this situation the learned counsel for the appellant would then contend that even on that finding the appellant cannot be placed in a worst situation. Instead, the appellant be allowed to restore the structure to the position as it existed prior to the datum line,namely, in the form of "A C sheet shed". This submission has been countered by the learned counsel for the respondent no. 2 on the argument that the court below has found as of fact that the shed on the south side was found to be removed in December l990. That finding is recorded by the trial court in para 33 onwards in the impugned judgement.For recording that finding the trial court has placed reliance on the documents being letter dated 29.l2.l990 issued by the Corporation addressed to the lessees of the Corporation. Indeed, the trial court is right in observing that the letter records the fact that items nos.2,4,7

and fresh breach item no. l mentioned in the breaches notice are found removed. It is on this basis the trial court proceeded to observe that the structure which existed at the relevant time was removed in l990. This finding, however, overlooks the fact that the said letter dated 29.l2.l990 is issued with reference to the earlier communication sent by the officers of the Corporation to the lessees of the corporation dated 3.3.l989. The said communication dated 3.3.l989 in turn refers to ll breaches and one fresh breach. Out of ll breaches, breach item nos 2,4,7 and fresh breach described as item no.l in the penultimate para of that letter has been stated to have bee removed at the relevant time. However, this communication dated 3.3.l989 also makes reference to the structure on "south east compulsory open space" in the form of "C I sheet shed" which was being used for club. The case of the appellant is that the existence of structure at item no.ll referred to in the letter dated 3.3.l989 on page 25 of the paperbook corresponds with the description of the structure which existed prior to the datum line and is the subject matter of the suit.

7. Indeed, the learned counsel for the appellant

fairly accepts that the finding which has been now confirmed by this court would mean that the structure has undergone change in description, for instance, instead of "A.C.sheet shed" now same is in the form of "C I shed" with other changes made therein in by erecting wooden loft and Tarpaulin shed with bamboos etc. The learned counsel for the appellant however submits that the appellant be given an opportunity to restore the suit structure to its original position as it obtained prior to the datum line l.4.l962 in the form of "A.C.sheet shed" with further understanding that the appellant will not use the compulsory open space for any other purpose than allowing the same for common enjoyment of the other occupants of the building, till appropriate authority permits the appellant to use it for any other permissible purpose in law. The learned counsel for the appellant states on instructions of the appellant who is present in court that the appellant, after removing the present suit structure shall restore the structure in the form of "A.C.sheet shed".

8. The question,however, that arises for consideration, as is rightly contended by the learned counsel for the respondents, is that

whether the structure was removed in the year l990, as is found by the trial court. As mentioned earlier the finding reached by the trial court on this aspect is seen from para 33 of the impugned judgment it makes reference only to a portion of the letter dated 3.3.l989. Thus, on fair reading of the letter dated 29.l2.l990 issued by the officer of the Corporation addressed to the lessees of the Corporation, breaches referred to as item nos.2,4,7 and fresh breach item no.l were found removed, it is not possible to take a view that the structure described at item no.ll in the letter dated 3.3.l989 was found removed by the officers during inspection. That structure is described as standing on "south east compulsory open space" with "C I sheet" which was being used as club. Whether the suit notice refers to the said structure described as item no.ll or otherwise is a matter which has not been answered by the trial court. In the event the finding on that aspect was to be in favour of the appellant, appellant would be justified in contending that structure existed even earlier in the form of "A C sheet shed" which was also the subject matter of Suit No.l554 of l958 and that the same was not removed at any time. Accordingly, the parties will have to be relegated

before the trial court to examine this aspect on the basis of the evidence already on record. It will be open to the parties to lead further evidence on this limited aspect, subject to the permission of the trial court in that behalf and the trial court would then proceed to give a clear finding on the question - whether the structure referred to in item no.ll in the letter dated 3.3.l989 corresponds to the offending structure mentioned in the suit notice. If that finding is in favour of the appellant, the appellant assures before this court personally and through her counsel that the appellant shall restore that structure to the original position as it obtained prior to l.4.l962 in the form of "A C sheet shed" and shall not use the open space in any other manner, but to be utilised as common facility for the other occupants of the building, unless clear permission is granted by the competent authority for permissible user in accordance with law; which permission will have to be granted by the competent authority after hearing the lessees of the Corporation, society respondent no. 2 herein. Those questions are left open to be decided on their own merits in accordance with law.

9. In the ultimate analysis, in my opinion, appeal ought to succeed to the limited extent as referred to above. The parties are relegated before the trial court on the limited issue as to whether the structure referred to at item no.ll in the letter dated 3.3.l989 corresponds to the offending structure in the suit notice dated 27.6.200l. The trial court shall decide that issue on its own merits in accordance with law.

l0. The appellant is present in court and undertakes personally and through her counsel that, on remand, in the event of adverse finding of the of the trial court, she shall forthwith remove the offending structure referred to in the suit notice and abide by the orders to be passed by the trial court in that behalf. On the other hand, if the finding is in favour of the appellant, in that case she shall restore the structure in the form of "A C sheet shed" and will not use the compulsory open space area which is to be used and enjoyed as common facility by the occupants of the building,for any other purpose subject to the lawful permission to be granted by the competent authority as may be permissible by law. The undertaking given by the appellant before this

court in the above terms is accepted.

ll. Till the matter is finally decided by the trial court no precipitative action be taken in respect of the suit structure on the undertaking given by the appellant before this court that she will maintain status quo of the suit structure as of today,till the disposal of the suit. Needless to observe that it will be open to the appellant to question the correctness of the findings recorded by the trial court in remand proceedings in accordance with law.

12. The trial court may dispose of the remand proceedings as expeditiously as possible, preferably within six months from the receipt of writ of this court.

l3. Accordingly this appeal partly succeeds on the above terms. The impugned judgment and decree is set aside and the matter is remanded to the trial court to decide the matter in terms of the observations made hereinbefore in accordance with law. The parties shall appear before the trial court on l4.2.2006 to facilitate the trial court to schedule the date of hearing of the suit.

No order as to costs.